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IN THE MATTER OF THE APPLICATION OF WEST END WATER COMPANY FOR EXTENSION OF EXISTING CERTIFICATE OF CONVENIENCE AND NECESSITY	**DOCKET NO. W-01157A-05-0706** **CLOSING POST HEARING BRIEF OF THE CITY OF SURPRISE**

Arizona Corporation Commission
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The City of Surprise ("Surprise" or "the City") submits its Closing Post-Hearing Brief. As explained fully in the City's Opening Brief, West End Water Company's ("West End" or "the Company") Application to extend its Certificate of Convenience and Necessity ("CC&N") should be denied. The City received a request to serve the property from the landowner and it is ready, willing and able to provide service. Moreover, the City has a constitutionally protected right to serve as the water service provider.

I. GRANTING WEST END'S APPLICATION WOULD INTERFERE WITH SURPRISE'S CONSTITUTIONAL AND STATUTORY RIGHT TO SERVE

a. The Authority of the Parties

Surprise has a constitutional and statutory right to provide water service where it chooses, both within and outside its corporate limits. *See* Const. art. II, § 34; Const. art. XIII, § 5; *City of Phoenix v. Kasun*, 54 Ariz. 470, 474, 97 P.2d 210, 212 (1939) (listing the "rules governing municipal corporations," which include "the right to furnish water . . . to customers without, as well as within, its corporate limits"). Additionally, this right to provide service is protected by A.R.S. §9-511, which provides that a municipality may engage in any business or enterprise which "may be engaged in by persons by virtue of a franchise from the municipal corporation." There is no dispute that the City is authorized to, and indeed does, provide municipal services to customers outside its corporate limits.

West End provides water service to a geographically designated service area pursuant to authority granted by Commission Decisions 16649 (granting CC&N to Spear Seven Water Company) and 50079 (transferring the CC&N from Spear Seven Water Company to West End). The Commission expressly confined West End to providing

water services within a limited area.[1] Within this area, West End is the exclusive provider and is entitled to exclude all other water providers. *James P. Paul Water Co. v. Arizona Corp. Com'n,* 137 Ariz. 426, 429, 671 P.2d 404, 407 (1983). West End is also entitled to be paid fair value for property and plant if its water system is ever condemned or taken over by a municipal corporation. A.R.S. §§ 9-515 through 518.

b. The Issue Presented

The central question presented by this case is whether the Commission has authority to interfere with a municipality's constitutional and statutory right to serve by granting a CC&N to a private water company for an area within the claimed service territory of the municipality. The City submits that the Commission lacks such authority and must defer to the City's right to provide service.

c. The Municipal Interest Should Prevail

Although Arizona has yet to articulate a clear legal standard for assessing whether to grant (or extend) a CC&N in an area that a municipality intends to serve, in analogous situations courts routinely grant special deference to municipalities. For example, before issuing orders contrary to municipality policy, courts require evidence

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[1] *See* February 20, 1979 Maricopa County Transfer of Public Service Franchise to JD Campbell, attached as Exhibit D to Spear Seven Water Company's Application for Transfer of Certificate of Convenience and Necessity and Sale of Assets in Docket No. 1045-E-1157 (defining West End's CC&N as "The South one-half of Section 11, the South one-half of Section 12, Section 13 except the Northwest quarter thereof, Section 14 except the Southwest quarter thereof, and Section 24, all in Township 5 North, Range 3 West; AND the Southwest one-quarter of Section 7, Section 18 and Section 19, all in Township 5 North, Range 2 West, Gila and Salt River Base and Meridian, Maricopa County, Arizona. AND NW1/4 of Section 13, T5N, R3W, G&SRB&M, Maricopa County, Arizona and known as Nadaburg Townsite.").

that the municipality committed "fraud or bad faith,"[2] "unquestionably abused" its discretion,[3] or was "clearly erroneous, arbitrary and wholly unwarranted."[4] *See also Homebuilders Ass'n of Cent. Arizona v. City of Scottsdale*, 187 Ariz. 479, 482, 930 P.2d 993, 996 (1997) (noting that "the wisdom of Scottsdale's choice of methods of meeting its water needs is a legislative, not a judicial, question").

West End cannot begin to meet this high standard. The uncontroverted evidence establishes that Surprise decided in good faith to extend service to the requested expansion area, after careful deliberation, as part of a state-mandated planning effort (the Growing Smarter legislation). (*See* City's Brief at 4-5 and 19-23 (citing evidence that the decision to serve came out of the developing and ratifying of Surprise's General Plan).) Consequently, the Commission should respect Surprise's General Plan, which sets forth a City policy designed to prevent "negatively impact[ing] the supply and quality of the city's water resources," and announces that the City will provide integrated water and wastewater service for areas like the requested expansion area. (Ex. COS-10 at p.123-24.)

West End does not directly address the special deference owed Surprise, but instead implies that the Surprise General Plan should be disregarded and, alternatively, asserts that the General Plan "has nothing to do with the regulation of public service corporations." (Applicant's Closing Brief at 3-4). Surprise disagrees. Utility service planning is at the heart of carefully managed and sustainable growth, and is integral to

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[2] *Uni-Bell PVC Pipe Ass'n v. City of Phoenix*, No. CV-04-0099-PHX-DGC, 2005 U.S. Dist. LEXIS 30286 at *12 (D. Ariz. Nov. 28, 2005).

[3] *City of Glendale v. White*, 67 Ariz. 231, 237, 194 P.2d 435, 439 (1948).

[4] *Edwards v. State Bd. of Barber Exam'rs*, 72 Ariz. 108, 113, 231 P.2d 450, 452 (1951).

the goals of the Growing Smarter legislation. West End also suggests that the Surprise General Plan conflicts with "[State] laws requiring a municipality . . . to condemn and provide just compensation to a public service corporation if the municipality elects to provide unregulated municipal utility services *where a regulated utility once served.*" (Applicant's Closing Brief at 4 (emphasis added).) This argument ignores the facts. West End has *never* served the requested expansion area and has no plant or property interest in the requested expansion area to be condemned. Further, Surprise's General Plan expressly states that Surprise will only serve areas "not currently covered by an existing water franchise." (Ex. COS-10 at p.123-24.) As a result, there is absolutely no risk that the Surprise General Plan conflicts with State condemnation laws.

West End also argues that an "existing regulated utility has the right to continue to operate and expand, even within the city limits, *unless and until* the City exercises its powers of eminent domain and condemns all or part of the regulated utility's plant and infrastructure." (Applicants Closing Brief at 16). West End cites generally to A.R.S. §9-515 and *City of Mesa v. Salt River Project Agricultural Improvement & Power Dist.,* 92 Ariz. 91, 373 P.2d 722 (1962), but neither support this proposition. To the contrary, A.R.S. §9-515 provides for the purchase of property of an existing public utility, where the public utility has "an existing franchise," "property and plant," and is currently serving residents. A.R.S. §9-515. West End has neither plant, property nor a certificate for the requested expansion area. Nowhere does Section 9-515 state, or imply, a right to compensation for property, plant or franchise that the utility wishes to one day acquire. The argument that condemnation and eminent domain law are applicable in this case is

pure bootstrapping. To accept this argument, the Commission must accept that West End has an compensable property interest in land that it is not certified to serve.

Nor does *City of Mesa v. Salt River Project* support West End's position. In that case, the Salt River Project Agricultural Improvement & Power District (the "District") was the authorized provider of electric service in the area in question. 92 Ariz. at 97-99, 373 P.2d at 726-29. At issue was whether the municipality could oust the District after annexing the area or, alternatively, compete with the District. The Court concluded that the City lacked authority to oust the District, and that it could not compete with the District. The Court accepted the City's argument that it was entitled to acquire District facilities by eminent domain. *Id.* at 103, 373 P.2d at 730-31. *City of Mesa* holds only that, within a public service corporation's existing authorized service area, a municipality may not prevent the corporation from continuing to serve without providing just compensation. *Id.* at 104, 373 P.2d at 731. Significantly, in *City of Mesa* the District was *already* the authorized provider of electric service in the area in question. *Id.* at 99-100, 373 P.2d at 728-729. Nothing in *City of Mesa* vests a public service corporation with a compensable property right in an undefined area outside its existing CC&N boundary.[5]

There are good reasons why Arizona does not recognize a compensable right of expansion for public service corporations. Not only would it be difficult to define such

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[5] The Commission generally requires public service corporations to obtain a CC&N extension before constructing additional infrastructure and serving outside existing CC&N boundaries. *See Tucson Gas, Electric Light and Power Co. v. Trico Electric Cooperative, Inc.*, 1 Ariz. App. 105, 108, 406 P.2d 740, 743 (Ct. App. 1965) (rejecting argument that a public service corporation had "carte blanche" authority to extend service to areas contiguous to existing CC&N and noting that, because the area in question was one that another utility had already announced an intention to serve, "caution should compel [the public service corporation] to apply to the corporation commission for a delineation of its area before undertaking such extension").

areas for individual public service corporations, but there would also often be conflicting claims by multiple public service corporations. (*See, e.g.,* Staff Report, dated October 26, 2006 at page 4, Dkt. No. W-01445A-06-0199 *et al* (noting that an expansion area that Arizona Water Company argued was a "logical extension" to its existing CC&N could just as easily be a logical extension to other water companies).) Further, while it would undoubtedly benefit public service corporations like West End to receive a financial return for land never included in their CC&Ns, this is not in the public interest.

d. Competing Municipal and Private Expansion Interests

Competing claims to serve, from a municipal provider and a private water provider, were the subject of litigation in *Sende Vista Water Cont'l, Inc. v. City of Phoenix,* 127 Ariz. 42, 617 P.2d 1158 (Ct. App. 1980). The underlying facts in that case are remarkably similar to the facts presented here. In *Senda,* a developer was poised to develop a large residential subdivision and planned to bear the expense of building the necessary water infrastructure. *Id.* at 43, 617 P.2d at 1159. A portion of the planned subdivision was within the CC&N of a private water company (Senda Vista Water Company). The acres that fell within the Senda CC&N (and within the proposed development) were unimproved and undeveloped. The remainder of the development was not certified to a particular private water company, but the City of Phoenix intended to serve the development. *Id.* The area at issue was in Maricopa County, and not yet annexed by the City of Phoenix. *Id.*

Faced with two prospective water companies (*Senda* and the City of Phoenix), the developer applied to the Commission for the deletion from Senda Vista Water Company's CC&N of the land within the proposed development. The Commission

granted that application. *Id.* at 43-44, 617 P.2d at 1159-60. The trial court reversed that Commission order and granted the private water company declaratory and injunctive relief. *Id.* at 44, 617 P.2d at 1160. On appeal, the Court of Appeals held that the City was not entitled to provide utility service in a certificated area unless it first acquired the property interest of the holder of the certificate for the area to be served. *Id.* at 45, 617 P.2d at 1161.

This holding bears on this case because, in examining the competing interests, the Court repeatedly recognized the City's authority to serve – without any compensation to the private water company – in the uncertified territory surrounding the private water company:

> The only right or interest of appellee [Senda] affected by the agreement was the bare certificate for water service within the 360 acres. As to that area, appellee was entitled to declaratory and injunctive relief. The declaratory relief to which appellee was entitled based upon the record before the trial court was limited to a declaration that appellant City of Phoenix had no right to provide water service to the public within the 360 acres covered by Senda Vista Water Company's certificate of convenience and necessity unless and until the City of Phoenix has acquired, by eminent domain or otherwise, Senda Vista Water Company's certificated right.

Id. at 48. West End's argument that the City would be obligated to condemn the expansion area before initiating service there (Applicant's Closing Brief 16), is completely inconsistent with the Court's holding in *Senda*. The Court of Appeals clearly articulated that the interest held by the private water company was defined – and limited – by its CC&N. *Id.*

Like the City of Phoenix, Surprise has a constitutional right to provide water service to neighborhoods that are in – or will one day be in – its municipal boundary. The only lawful impediment to that right is the City's obligation to first acquire the

property interest of the holder of the certificate for the area to be served. In this case, there is no certificate holder for the area to be served and, thus, there is no reason a certificate should be issued by the Commission when the City stands ready, able and willing to serve this parcel of land.

II. THE PUBLIC INTEREST FAVORS SERVICE BY SURPRISE

Setting aside that granting West End's application would impermissibly interfere with Surprise's constitutional and statutory authority to provide water services, West End's Application still fails under the Commission's legal standard for assessing competing public service corporations' applications.

a. West End Has Failed to Show a Necessity for It to Serve

Woodside Homes has requested service for the expansion area only from the City, and the City has agreed to provide that service. West End admits that it never received a similar request for service. (Applicant's Closing Brief at 6-7; *see also* City's Brief at 5-6 (citing evidence that, despite expressly asking Woodside Homes for a request for service, West End has not received one).) Without a request directed to West End, and with the affected landowner happy to accept service from Surprise, there is an insufficient showing of public necessity to expand West End's CC&N. (*See generally* City's Brief at 10-13 (discussing two important policy reasons for requiring requests for service).)

Indeed, it is to ensure necessity exists that Staff traditionally always requires that request for service letters be submitted before recommending approval of an extension request. As Assistant Director Steve Olea testified last year in a matter concerning two competing CC&N expansion requests, "Staff has always been [of] the opinion that there

has to be a need for service, and without a request, there is not a need, so there is no need to have a certificate of convenience and necessity because the necessity portion isn't met." Transcript Vol. VII at 1415:3-18 (Aug. 4, 2005), Docket Nos. W-04264A-04-0438, SW-04265A-04-0439, and W-01445A-04-0755. Importantly, this testimony was given great weight by the Commission, as documented in the resulting Opinion and Order, where Mr. Olea's comments were specifically referenced and relied on to deny extension into areas lacking requests for services. *See* February 2, 2006 Decision No. 68453 at ¶¶ 78, 119, and 129, Docket Nos. W-04264A-04-0438, SW-04265A-04-0439, and W-01445A-04-0755; *see also* February 2, 2006 Decision No. 68445 at page 4, Docket No. W-01854A-05-0543 (declining to approve extension into area without request for service); December 28, 2001 Decision No. 64288 at ¶¶ 47, 70, and 84, Docket Nos. SW-04002A-01-0228 and WS-02987A-01-0295 (declining to approve extension into area without requests for service because without them, "a public need and necessity has not been established").

In an October 26, 2006 Staff Report, filed in Docket Nos. W-01445A-06-0199 and W-03576A-05-0926, Staff most recently confirmed that requests for service remain an important and necessary prerequisite for granting extensions. Confronted with competing applications to extend CC&Ns into areas where no public service corporation had received a request for service, Staff recommended that "only areas for which requests for service were received should be included in the CC&N extensions awarded in this docket."

While Staff notes in its Opening Brief that in two pending Commission cases, Staff has suggested that in certain extraordinary situations it may be appropriate to

grant an extension without a request for service, Staff and West End cite no Commission or Court decisions endorsing Staff's recommendation to deviate from the long-standing Commission tradition of requiring requests for service in situations where multiple providers seek to provide service to the same area. And, as Staff acknowledges, in the only one of the two pending cases to have gone to Open Meeting, the Commissioners stayed further proceedings because of concerns about the lack of requests for service.

With insufficient evidence of a necessity for West End to serve, the Hearing Officer is left with two options: (1) denying the application, or (2) suspend the Application to allow West End to supplement the record with a request for service, if such a request is forthcoming. If no request for service is made upon West End, then West End's application for expansion of its CC&N should be denied.

West End has argued that Woodside Homes is acting under pressure and for this reason has not submitted a request for service to West End. This is directly contradicted by the testimony gathered at the September hearing from the party who was purportedly pressured. Gene Morrison, the regional president of Woodside Homes, unequivocally testified that he was not pressured or threatened in any way by Surprise. (Sept. Tr. 70:21-71:4.) Further, Mr. Morrison stated that Surprise never connected the provision of water services to Surprise's providing sewer services to the Walden Ranch development. (Sept. Tr. 71:5-12; *see also id.* at 108:2-14 (testimony by the City's witness that he never threatened anyone).)

Mr. Morrison's testimony is validated by Surprise's written commitment to provide sewer services, delivered when the then owner of Walden Ranch was requesting water

services from West End. (*See* COS-23 (May 16, 2006 letter from Special Counsel to the City of Surprise to the Maricopa County Planning and Development Department stating that it is "the intent of the City of Surprise to provide wastewater services to the Walden Ranch development"); Sept. Tr. 108:7-109:19.) Further, both in signed City documents and under oath in this proceeding, Surprise has repeatedly confirmed it will provide sewer service without regard to the ultimate water provider. (Sept. Tr. 110:3-21 (testimony that the City sent a will serve sewer letter on July 17, 2006 to Woodside Homes and would have sent this same letter even if Woodside Homes had not requested water services); *id.* 119:19-120:6 (testimony that, in the event West End's application is granted, Surprise will still provide sewer services); May Tr. 237:16-238:1 (testimony that it would not "be a problem" for Surprise to provide wastewater services in the event that West End obtains an extension).)

That Surprise has *not* pressured Walden Ranch's former and current developers is most tellingly demonstrated by the fact that Gary Jones, the former developer's representative, sent the letter (which has since been withdrawn at the request of Woodside Homes) requesting service from West End before selling the property to Woodside Homes. (*See* Sept. Tr. 28:19-29:14)

If there is mischief afoot, the record suggests that it is West End and Woodside Homes who have been attempting to unfairly manipulate the City, the Maricopa County Planning & Zoning Commission, and this proceeding. For example, witnesses from both West End and Woodside Homes offered testimony during the September 13, 2006 evidentiary hearing that failed to accurately capture what actually occurred five days earlier at the September 7, 2006 Regular Meeting of the Planning and Zoning

Commission of Maricopa County ("P&Z Meeting"). West End's assertion that Woodside Homes' attorney Mr. Curley "informed the County Planning and Zoning Commission that his client had no preference between [West End] and Surprise for water services,"[6] is contradicted by the transcript of that proceeding, which shows that Mr. Curley actually stated that Woodside Homes preferred service from Surprise.

Mr. Curley: West End came to the original owners of this site and said, we would like to expand [West End's CC&N] . . . Would [the original owners] support it?

The previous owners of the site said, Yes. And hence the CC&N requests started processing through the Arizona Corporation Commission.

The City of Surprise then came to [Woodside Homes] and said, Look, we have a problem with a lot of these private water companies. We're annexing up Grand Avenue. We would prefer to be the water provider. And [Woodside Homes] agreed. So right now, the water situation is as follows, it's either going to be . . . the City of Surprise or it's going to be West End. That's going to be decided within the next couple of weeks.

. . .

We prefer the City of Surprise, but we can live with West End also. And so we can't control West End's ability to petition the Corporation Commission to extend their CC&N –

. . .

Chmn. Barney: Can [Woodside Homes] speak [at the Corporation Commission's September 13, 2006 evidentiary hearing] and any other events that might bring resolution to [the issue of who provides water services]?

Mr. Curley: It is my understanding . . . that the Corporation Commission gives very strong weight to what the applicant whose property is going to be served – what their desires are.

I can't speak for the judge. ***I think that it's likely – now that [the former owner has] withdrawn [its] request for the – for the expansion of the CC&N, I think it's likely the City of Surprise is probably going to be the provider*** . . . .

[6] Appellant's Closing Brief at 8 (citing testimony by Marvin Collins).

Chmn. Barney: But again, my question is, On September 13th, what do you think an outcome of that –

Mr. Curley: ***I think the outcome of it is going to be that the City of Surprise is going to be the service provider.***

(September 7, 2006 Regular Meeting of the Planning and Zoning Commission of Maricopa County Transcript, filed on November 13, 2006, at 14:6-16:8 (emphasis added).) West End's less than candid description of what actually occurred at the P&Z Meeting is especially troubling given that West End's manager, Marvin Collins, and its retained expert, Ray Jones, both attended the P&Z Meeting and heard Mr. Curley tell the County that Woodside Homes preferred service from the City of Surprise.[7]

Woodside Homes' neutrality (at least before this body) defeats West End's argument that necessity exists for a private water company to serve. West End cannot show necessity given that Surprise is willing to provide, and Woodside Homes is happy to accept service from Surprise. At most, Woodside Homes' inconsistent position (before the County and the Commission) counsels toward suspending this matter until Mr. Morrison has an opportunity to meet with his attorney, discuss this issue, and clarify for all involved Woodside Homes' position on the water service provider.

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[7] Interestingly, just days after the P&Z hearing, Mr. Morrison testified in this proceeding that it "wouldn't surprise" him if, as West End's attorney stated, during the P&Z Meeting "Mr. Curley informed the Commission . . . that Woodside Homes is neutral as to West End Water Company or Surprise as the water service provider . . . ." (Sept. Tr. 72:17-23.) While Mr. Morrison was not present at the P&Z Meeting, Mr. Curley attended and spoke on behalf of Woodside Homes. There is no evidence that Mr. Curley inaccurately conveyed Mr. Morrison's intentions when he said at the P&Z Meeting that Woodside Homes preferred water service from Surprise. Indeed, county commissioners relied on Woodside Homes' representations that it favored Surprise and expected Surprise to be the water provider when they voted to approve Woodside Homes' project.

Indeed, Assistant Chief Administrative Law Judge Nodes recently did exactly this in an analogous case. (*See* Docket Nos. W-02859A-04-0844 and WS-02987A-04-0869.) In that case, Judge Nodes was confronted with a situation where both Diversified Water Utilities, Inc. ("Diversified") and Johnson Utilities Company ("JUC") sought to extend their existing CC&Ns to cover the same area. Initially, JUC received a request for service from the affected landowner. (*See* Affidavit of Jeff Schneidman, attached as Exhibit to April 22, 2005 Motion to Continue, at ¶ 3.) The landowner later sold the land in a two-part option contract. (*Id.* at ¶¶ 3-4.) After one part of the option contract was completed, the new landowner withdrew the request for service to JUC. (*Id.*) JUC then voluntarily withdrew its application and moved to stay the proceeding as to Diversified's application, arguing that without a request for service Diversified could not make an adequate showing of necessity. (*See* April 22, 2005 Motion to Continue at 2.) Staff agreed with JUC, noting that only in "an exceptional situation" should an extension be granted absent a request for service, such as when the applicant "is the only possible service provider." (*See* April 29, 2005 Staff's Response to Motion to Continue at 1.) In a May 11, 2005 Procedure Order, Judge Nodes stayed the matter, over Diversified's objection, until such time that one of the public service corporations received a request for service. (*See* May 11, 2005 Procedure Order at 5.) A similar outcome in this case – a suspension to clarify the property owner's preference – would create a more complete and substantial record supporting the Commission's ultimate decision.

b. The Public Interest Favors Surprise

The public interest is best served by allowing the growth of a strong municipal provider of integrated water and wastewater services. As explained below, the City's

General Plan, its ability to provide immediate service, and the general superiority of municipal (vs. private) water service, all support the City's desire to serve this parcel of land.

1. Supporting Surprise's General Plan Promotes the Public Interest

West End may not like it, but Surprise has done far more than "purport[] to have a policy" concerning water services within GPA. (Applicant's Closing Brief at 4.) Pursuant to Arizona's Growing Smarter legislation, which impresses upon municipalities the importance of actively involving citizens in the development and adoption of municipal growth management plans, Surprise adopted (and later ratified by a vote of the majority of qualified Surprise voters) a General Plan which, as required by Arizona law, includes a water resource element. (*See* City's Brief at 22-24 (discussing Surprise's enactment of a General Plan pursuant to Arizona law).) Specifically, Surprise decided after careful deliberation and advice from numerous city, county, and state planning experts, that it was in the public interest for Surprise to provide "all future water service in areas [within the GPA] that are not currently covered by an existing water franchise." (Ex. COS-10 at p. 124.)

Yet, West End now asks the Commission to disregard Surprise's substantial, time-consuming, state-mandated planning and approve an application that directly contradicts the General Plan. West End offers no justification for ignoring the General Plan other than a passing, incorrect comment that a general plan "has nothing to do with the regulation of public service corporations or the jurisdiction of the ACC." (Appellant's Closing Brief at 3-4.) Contrary to West End's assertion, municipal planning requirements exist to promote the public interest. Therefore, when numerous City

leaders and citizens concluded that Surprise needed to halt the growth of new or existing private water companies within its GPA, they did so because, in their reasoned opinion, it was in the public interest for Surprise to promote the development of one primary, municipality-owned water service provider in the GPA. It would not be in the public interest for the Commission to now act contrary to that decision. *Cf. Home Builders Ass'n of Cent. Arizona v. City of Scottsdale*, 179 Ariz. 5, 11, 875 P.2d 1310, 1316 (Ct. App. 1994) (stating that a "municipality has the personnel and expertise to consider matters concerning acquisition of water supplies and its effect on current and future residents"); *Home Builders Ass'n of Cent. Arizona v. City of Scottsdale*, 187 Ariz. 479, 482-83, 930 P.2d 993, 996-97 (1997) (affirming Court of Appeals and noting that "the wisdom of Scottsdale's choice of methods of meeting its water needs is a legislative, not a judicial, question").

2. Surprise Can Provide Service Just As Fast As West End, and the Public Would Be Better Served By An Integrated System

It is beyond dispute that the City can provide integrated water and sewer services just as fast as West End can provide only water services. (*See* May Tr. 195:2-13 (Surprise testimony that water service will be provided in same time frame by either party); 267:18-268:2 (Staff testimony that water service will be provided in same time frame by either party).) As Staff's expert witness testified, the time frame for engineering and building the water system would be the same whether West End or the City serves because it is the developer who will be funding and constructing the necessary infrastructure. (May Tr. 199:16-200:6; 265:22-266:17; 267:18-268:2.)

Although West End tries to make much out of its having existing infrastructure closer to the extension area than Surprise, this is a red herring. West End does not

deny that this infrastructure is wholly incapable of adequately serving the extension area. (*See, e.g.*, Ex. S-1 (Staff's Report) at 2 (noting that West End's existing infrastructure has "inadequate storage and production capacity" to serve the anticipated new customers within its existing CC&N, much less the extension area); Ex. A-4 (West End's Expert's Report) at 13 (concluding that "[t]he existing West End facilities will be inadequate to serve the new developments" and recommending abandoning existing infrastructure in favor of, essentially, a complete rebuild); May Tr. 47:22-48:3 (West End admitting that both West End and the City will need to build new plant and infrastructure to service the extension area).)[8]

Both West End and Staff attempt to obscure this fact by (incorrectly) asserting that West End can provide service "immediately" to the expansion area and citing testimony given by West End's manager. However, review of the cited testimony establishes that West End's manager never said that West End could immediately provide services. He merely stated that, upon obtaining all necessary Commission approvals, West End "can start construction immediately" of the infrastructure necessary to provide service. (May Tr. 115:20-21.) Given that the party funding this construction will be Woodside Homes, Surprise can also immediately start construction of infrastructure upon resolution of this matter. (*See, e.g.,* Sept. Tr. at 88:20 (developer testifying that it is funding construction).)

[8] It is worth noting that while West End asserts without any evidentiary support that Surprise has a "paucity of water infrastructure," West End cannot dispute that Surprise's existing infrastructure is substantially larger and in better condition than West End's. Further, Surprise's existing system, unlike West End's, does not suffer abnormally high water loss, inadequate fire flow, or lack of back-up capabilities. (*See generally* City's Brief at 24-25.)

While there is no difference in the speed with which either Surprise or West End can provide service, significant differences exist in both the quality of services to be provided and the cost to ratepayers for those services.

First, only Surprise can provide integrated water and sewer service, something that the Commission has repeatedly stated is in the public interest – even when building that system may initially cost more than building a non-integrated system. *See, e.g.*, Decision No. 68453 in Docket Nos. W-04264A-04-0438 and SW-04265A-04-0439, at ¶129(4), attached as Exhibit 1 to the City's Brief.

Second, Surprise will provide a superior system at lower cost to ratepayers. This is evidenced by West End's recently completed rate case, as well as by how West End would reimburse the developer for funds expended on infrastructure. The Commission only recently approved a rate increase for all current and future West End ratepayers of approximately 60%. (*See* August 29, 2006 Decision No. 68925 at ¶¶ 33, 44, and 45.) This significant rate increase (which does not take into account cost recovery associated with entirely rebuilding West End's system to service the expansion area) already has West End's ratepayers paying far more than Surprise's ratepayers. When one takes into account how West End will likely reimburse the developer for rebuilding West End's system to enable it to service the extension area, it becomes evident that West End's ratepayers will, in the near future, be shouldering yet another substantial rate increase. (*See* City's Brief at 21-22 (describing how West End will likely reimburse the developer back over time through revenue collected from ratepayers).) In contrast, Surprise would use development impact fees to reimburse the developer – a

mechanism that ensures that development costs are paid by only those individuals who choose to buy a home in the requested area. (*See id.*)

Finally, with respect to timing, Staff mistakenly asserts that the City is unable to provide water services to the extension area prior to its annexation. (*See* Staff's Closing Brief at 4-5.) To the contrary, and as the City has repeatedly stated, exactly the opposite is true. In its July 17, 2006 will serve letter to Woodside Homes, in testimony at both the May and September hearings, and in the City's opening post hearing brief, the City has conveyed that it is willing to provide service under a pre-annexation agreement before annexation occurs. Thus, there is no material difference between West End's ability and the City's ability to work with the developer on infrastructure that will serve the expansion area.

3. The Public Interest Favors Municipal Water Service Over Private Water Service

The desirability of municipal ownership is a generally accepted principle that the Arizona Supreme Court recognized in *Citizens Utilities Water Co. v. Superior Court*, 108 Ariz. 296, 300, 497 P.2d 55, 59 (1972). *See also* City's Brief at 21-22 (discussing the public benefits of municipal ownership). At a loss to respond with evidence to the contrary, West End argues that selecting a municipal provider in this case would "release future customers to the uncertainties of an unregulated provider." (Applicant's Closing Brief at 16.)

This argument was made, and soundly rejected, almost 70 years ago by the Arizona Supreme Court in *City of Phoenix v. Wright*, 52 Ariz. 227, 80 P.2d 390 (1938). In that case, which held that the Commission has no jurisdiction to regulate municipal corporations when providing services either inside or outside of municipal corporate

limits, the court rejected an assertion that by so ruling it was subjecting consumers outside the municipal limits to potentially "grievously" oppression because:

> Any of the present consumers of [the City of Phoenix's] water are at liberty to secure water from any other source available . . . [such as] from individual wells . . . . Further, there is nothing to prevent the organization by any number of these consumers of a community water plant which may supply the needs of as many as desire to contribute thereto, without [the City of Phoenix] having the power to prevent them from so doing. In the second place . . . if it be deemed advisable to regulate the rates to be charged by municipal corporations from consumers of water outside of their corporate boundaries, the legislature has plenary power, except as limited by the constitution, to make such regulations . . . . But, should all these means fail, and should it appear that the corporation commission is the only branch of government which is both willing and able to protect the rights of private citizens against the oppression of adjacent municipalities, and the people of Arizona are satisfied that this is so, the Constitution may be amended at any time to confer upon the commission the jurisdiction which they now seek to exercise in violation of its express language.

Id. at 236-37, 80 P.2d at 393. Tellingly, despite intervening decades where municipalities have routinely provide service outside their boundaries, no such legislation or Constitutional amendments have been adopted.

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III. CONCLUSION

The Commission should deny West End's application. To grant the application would run directly counter to the City's General Plan and impermissibly interfere with the City's constitutional and statutory right to serve. Further, there is no necessity for West End to serve given that Woodside Homes has requested service from the City, and the City has agreed to provide such service. Finally, the public interest favors service by the City, not the expansion of the West End Water Company.

Dated this 21st day of November, 2006.

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Copies of the foregoing mailed
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